VILLAINAGE IN ENGLAND.

NO one who recalls the progress of historical research in England, can fail to be struck by the fidelity with which it has followed the shifting political controversies of successive generations. During the troubled period of the Reformation the theme of scholars' pens was the extension of the jurisdiction of the "bishop of Rome" (as by act of Parliament they were bidden to designate the pope), his encroachments upon independent patriarchates and his invasions of the prerogatives of English sovereigns. When the Stuarts and their Parliaments were at issue, antiquaries and pamphleteers industriously raked among Lancastrian or Tudor precedents, according as they espoused the side of the Commons or of the kings. Within our own day have come the extensions of the franchise, the historic significance of which has been illuminated by Lord Beaconsfield's famous saying that "we are reverting to Anglo-Saxon institutions." Contemporaneously with these movements arose the schools of Bishop Stubbs and the late Professor Freeman, whose investigations of original documents, covered for ages with the dust of oblivion, have made our free Teutonic forefathers live again for us. And now, with the development of small proprietorships, whether in the independent form of Parliamentary freeholds or in the dependent form of allotments, the eyes of students are turning back to the peasant tenures of the ages before and following the Conquest. Mr. Seebohm's well-known work has long held the field. The most important that has since appeared is the volume of Mr. Vinogradoff on *Villainage in England*, the first instalment of an undertaking which proposes to lead us ultimately to the *origines* of the manorial system, as far back as they are to be traced in the records of the English settlement of Britain. Upon the subject of

villainage an extraordinary dearth of information yet prevails. The very complications of the tenure tempt to indolence and excuse inexactness. Whether his conclusions be accepted or not, Mr. Vinogradoff has at any rate amassed sufficient material and reduced it to a compass moderate enough to exclude the plea that a knowledge of the subject is not readily attainable.

Every one knows that the first thing a legal text-book has to say of villainage is that there were two kinds of villains, "villains regardants" and "villains in gross." The terms have suggested, with a force that not even the industry of Mr. Freeman could resist, that the first represented the ceorl, or free Saxon peasant, the last the theow, or Saxon slave. Mr. Vinogradoff, after reference to the Year Books, comes to the conclusion that they were mere lawyers' terms of art and "have nothing to do with a legal distinction of status." Now, it is no doubt true that the terms do not indicate two degrees of servitude. On the other hand, I hold that they mean something, and that something, a closer or laxer connexion with a manor. Mr. Vinogradoff prints in his Appendix II a very interesting case from the Year Book of 29 Edward III, where it is expressly urged that a man when he was, to quote the grotesque law French of the original, "allant et walkant a large a sa frank volunte come frank home," could not be said to be a villain regardant to a manor. And, with a frankness that almost disarms criticism, Vinogradoff himself acknowledges that Littleton, in declaring that a claim to a villain in gross is proved by prescription, is "not quite consistent" with his own exposition that "if the lord has to rely upon prescription, he has to point out the manor to which the party and his ancestors have been regardant, time out of mind." The two statements are in truth contradictory. The fact is that lawyers' terms of art come into being in a perfectly natural way. They are devised to express actually existing distinctions — the ossification, so to speak, of custom. They register; they do not create. Social changes empty them of their content in time, and they degenerate into mere instru-

ments of legal ingenuity — an apparatus of cabalistic signs for the confusion of laymen. To this level had these distinctions between villains sunk by the end of the sixteenth century. But that they once had an effective meaning is disclosed by a remark of Coke as to the right of action of a villain against his lord "for the death of his father, or of his other ancestors, whose heire he is." "There is no diversitie herein," Coke writes, "whether he be a villain regardant or in grosse, *although some have said the contrary*." If the distinction between the two terms was originally what I take it to have been, it is quite intelligible that, while the right of action might be thought to lie with the lord of a villain regardant, it might be personal in the case of a villain in gross.

The main question as to the origin and significance of the terms is very full of difficulties, and neither the summary dismissal of them by Mr. Vinogradoff nor any solution that has been suggested conveys with it full satisfaction to the mind. Mr. Vinogradoff rightly goes back to the fountains of knowledge. He has traced the terms villain regardant and villain in gross through the Plea Rolls as far back as the reign of Edward II, before which time they do not appear to have existed. They both described the lowest class of dependents. This, we may remark, is confirmed by the precedents of grants and manumissions in Madox's *Formulare Anglicanum*, in which it is noteworthy, as will presently be seen, that while a "native" might be regardant to a manor, not one of the sales speaks of a villain regardant or even of a villain. We know from Britton and from Andrew Horne, the author or editor of *Le Myrrour des Justices*, that a "serf," to use the language of *Le Myrrour* — a "native," according to that of Britton — was annexed to the frank tenement of his lord. If he fled, his lord might pursue him as his chattel, apprehend and bring him back into his fee. Now, in the case printed by Mr. Vinogradoff in his Appendix II, taken from the Year Book of 29 Edward III, this doctrine is laid down of villains regardants. It is the right of the lord to take them at will. It is not, therefore, a violent inference that serfs, or

natives, and villains regardants were the same in legal status. We have a further indication of this in the statement of Littleton that a villain regardant could be granted away from a manor and then become a villain in gross. Clearly, if this were true of tenants in villainage generally, they might all have been reduced to serfdom, and could not be said, as they were said, to be *ascriptitii*. Serfdom is also implied in the case in question. The "master" pleads (*a*) that the servant was his "villain regardant" to the manor of C, and (*b*) that he was master of his services *and of him*.

Who, then, were the villains in gross? They were serfs unattached to any holding. Descended of servile parents, they were serfs in blood who, on payment of an annual "chevage," or head-money, by way of acknowledgment of their status, were allowed by the lord to seek their fortunes outside the manor. Britton speaks of these, "who hold nothing in villainage"—the terms villain regardant and villain in gross being somewhat later than his time. Blackstone understood the distinction and points to it by calling villains in gross villains "at large." Sometimes the chevage was compounded. The non-compounding *capitagii*, that is, of course, the great majority, were sworn to continue their payments. "As long as they pay chevage," Bracton tells us, "they are said to be under the authority of their lords, nor is the power of their lords dissolved; and when they cease to pay it, they begin to be fugitives." The chevage was the evidence of the prescription which, according to Littleton, had to be proved.[1] The personal relation of the lord to the serf was left; the praedial relation had ceased to exist. This is indicated by the plea given by Britton as, apparently, the equivalent of the later plea of villain regardant. According to Britton, it was incumbent on the lord to prove that the villain claimed was his "astrier," the Anglo-Saxon "heord faest," and "resident in his villainage." Mr. Vinogradoff, who

[1] Mr. Furnivall, in Ballads from Manuscripts, I, 14–15, gives a Scotch deed of 1220 by which the Prior and Convent of St. Andrew's grant a license to their "nativus," G. M. "quod erit cum domino I," on condition of the yearly payment of one pound of wax.

mentions this, does not seem to see clearly how this formula stamps the difference between the two. His summary (page 56) that "villain in gross" means a villain without further qualification, while "villain regardant to a manor" means villain by reference to a manor, is scarcely adequate.

The disappearance of the system implied in the term villain in gross was due to a combination of various causes. The rule that a sojourn on land of ancient demesne of the king or in a chartered town for a year and a day conferred enfranchisement was largely taken advantage of. The expense of searching for and reclaiming fugitive serfs must have far exceeded their value when recovered, and the lord would often save his pains and his pocket by levying the chevage on the serf's pledges or relatives, as an example given by Mr. Vinogradoff from the Common Plea Rolls of 29 Edward III shows us sometimes happened. Above all, the pestilences of the fourteenth century and the enclosing movement which followed them must have finally accomplished the change. It became the interest of the lords to replace men by sheep, as Sir Thomas More complains in the *Utopia*. They probably offered no obstacles in the form of exactions to any one who might seek to leave their manors. On the contrary, as we know from the demands of the insurgents of 1536, they raised their fines on renewals of leases of demesne. The arrangement which had originated in pecuniary considerations on both sides naturally came to an end when those considerations were reversed.

In dealing with the rights and disabilities of villains Mr. Vinogradoff throughout his work appears to halt between two opinions. The first essay conveys the general impression that the villains were a servile class, wholly dependent upon the will of their lords for such concessions as in course of time they may have received. On the other hand, the drift of the second essay is to show that behind the manorial system lay the superseded but still partly operative organization of the free community. To establish this — and this I regard as the most valuable portion of Mr. Vinogradoff's work — it was necessary to emphasize all those legal incidents of villainage

which redeemed it from servitude. The two parts of the work do not hang together.

It may be said that the business of the historian is to stick to truth and not to elaborate systems which can only be made to accommodate facts by resort to the Procrustean method. As a general proposition that is incontestable. The fault that may be urged against the first of Mr. Vinogradoff's essays is that while he accumulates an immense mass of valuable facts, he is himself somewhat overwhelmed by them, and has failed to grasp the key to the problems they present. In his first essay there is a general identification of the terms *servus*, *villanus* and *nativus* with respect to personal condition as well in actual practice as in legal theory. As to the latter, there is *prima facie* something to be said in favor of the identification, though even here there are, as I shall presently show, two sides to the question. Of this Mr. Vinogradoff appears to have become aware by the time he had reached his appendix. But if practice conformed to theory, how could a peasantry indiscriminately reduced to serfdom have attained freedom, unless by some emancipating act like that of Alexander II in Russia? The fact is that there were two schools of law. The one, based upon the Roman codes, has survived in the pages of Bracton and Britton. The other has been handed down to us only in *Le Myrrour*, though we may take it that the author of the unfinished *Quadripartitus*, lately re-discovered by the German scholar Liebermann, belonged to the same school. But *Le Myrrour's* superior fidelity to English usage is discernible from the compilation ascribed to Ranulf Flambard, called the Laws of William the Conqueror, from the Laws of Henry I and from the Great Charter.

This is not the occasion to enter at large upon the merits of these rival schools. In his Appendix III Mr. Vinogradoff gives an interesting review of *Le Myrrour*. But in my opinion he fails altogether to do it justice, and his work has suffered by his neglect to draw from it. According to Coke, *Le Myrrour* was written not later than the reign of Edward II. It consists of two portions, of which the latter undoubtedly

belongs to that age, the former to an earlier period. It is with this earlier portion, in connexion with villainage, that we are specially concerned. The book as a whole is a conservative exposition of the law of England, written as a protest against the Romanizing tendencies of Bracton, Fleta and Britton. It sets forth the rights of villains in general accordance with the codes I have cited, as well as with the general practice of the courts. To the courts such codes, or at any rate the usages they embodied, and not the abstract principles of the civil law, furnished the precedents of decisions. And the leanings "in favor of liberty" which marked them were reinforced by the precepts of the church. I do not desire to underrate the work of Bracton or of Britton or of Fleta. But when we find all three of them servilely copying out the titles of Justinian's *Institutes* and presenting them to us as the principles of law recognized in a country where Justinian's *Institutes* had been practically unknown, we may well hold their testimony suspect. And we find in page after page of these authors facts disclosed which are wholly incompatible with their initial principles. How, for instance, if the villain was a slave, did the courts come to allow him to be capable of an independent contract with his master? How, if all he had was his lord's, could he purchase and hire from his lord? How did the courts evolve from such principles the practice of protecting him in his holding when he had duly performed his services? The doctrines of Bracton and his school as to villainage are not merely inconsistent with *Le Myrrour*, with the codes and with the practice of the courts: they are inconsistent with themselves. But by these great names Mr. Vinogradoff has been led astray. The investigator who sets out with the assumption that villains, serfs and natives are one and the same in origin, in rights and in disabilities, inevitably loses himself in the labyrinth of facts which seem to point at one time to their common servitude, at another to the comparative independence of villain tenants.

While the documents to which reference has been made were, in the spirit of *Le Myrrour*, careful to maintain the rights of villains, the application by the Romanizers of the standards

of the *Institutes* made short work of the distinctions between the various forms of dependent status. "In servorum conditione nulla differentia est," said the *Institutes*. Fleta copies the words. Britton paraphrases them, and at once the rift is seen in the symmetrical uniformity of the theory, when applied to English custom. "Ne nul ne poet estre plus *vileyn* de autre, car touz sount de vile condicion — qi qe unques est *serf*, *il est ausi pur serf* cum nul autre."[1] The very fact that Britton should have thought it necessary to amplify the simple proposition of Justinian imports suspicion as to the extent to which his theory was reconcilable with what he saw around him. He uses three designations, "villains," "serfs" and "pure serfs," where the Latin text has but one. "Villain is serf and serf is villain," he says in effect. But there are those, his expressions suggest, who distinguish between them. One of them, as we know from Mr. Nichols's learned edition, was an anonymous contemporary commentator upon his own text, "who subsequently filled judicial offices." This writer draws three distinctions in that class which Britton, on Justinian's authority, has pronounced indistinguishable. A *naif*, or native, he tells us, is a hereditary serf. A villain is he that comes afresh into servitude, from which he cannot depart, "*though he be of a free stock.*" Evidently the writer is seeking a compromise between theory and practice. There are, he sees, incidents attached to villainage in English law inconsistent with the doctrine that villainage is serfdom. These must be connected, he surmises, with a strain of free blood which has carried with it some relief from the disabilities in the Roman code attendant upon servitude.

Let us now turn to the English school of jurists, as represented in *Le Myrrour*. "Villains," the author insists, "are not serfs," and from the fact that he heads his chapter on serfs with the words "*De Naifter*," we know that he considers *naifs*, or natives, and serfs to be identical.

Serfs [he tells us] can purchase nothing but for the use of the lord. They do not know in the evening what service they shall do in the

[1] Britton I, xxxii, 3.

morning. Their lords may put them in irons, in the stocks, may imprison and chastise them at will, saving life and limb. They may not fly from, nor forsake their service, so long as they find that on which to live, nor is it lawful for any to receive them without their lords' will. If these serfs hold fiefs of their lords, it is to be understood that they hold them from day to day at the will of their lords, and by no certainty of services.

This uncertainty of service was the mark of serfs, or of what Bracton, forgetting his doctrine and falling back upon fact, calls "pure villains" (f. 208, b). It logically follows that in such a case performance of service cannot be pleaded in bar to an action, since service which is without limit can never be performed. Nor, conversely, need default be alleged to justify eviction.

Villains [*Le Myrrour* proceeds to say] are cultivators of fief dwelling in villages upland; and of villains is mention made in the Charter of the Franchises, where it is said that a villain may not be so grievously amerced as that his tillage (*sa gaigneur*) should not be preserved to him; for of serfs it makes no mention, for that they have nothing of their own to lose. And of villains their holdings are called villainages.

And the author concludes by appealing to the days of King Edward, the Golden Age to the English of the thirteenth century. With the great men of those days he compares, and comparing condemns, the lords of his own day — practisers, no doubt, of the doctrines of the Romanizing school — who by wrongful distresses and evictions had sought to reduce their villains to serfdom, a wrong for which, as he recalls, there was remedy by the writ *Ne injuste vexes*.

In the light of these very positive statements let us revert to the exposition of Mr. Vinogradoff. In the earlier part of his work, as has been said, he reduces the dependent classes to a dead level of serfdom. Possessed by this doctrine, he misreads the evidence incidentally disclosed even by the jurists whose servile Romanisms he follows. "A villain," he tells us, (page 61), "is born in a nest, which makes him a bondman." In the note he gives two references, one to a case of 1303, the

other to Bracton. Yet both these examples show that the term which Mr. Vinogradoff applies to a "villain," *sans phrase*, is used of a *nativus*, or *naif*. That these were very different classes appears from another case selected by himself (page 46, note 1). In 1274 two tenants summon their landlord before the king's court. They do not pretend to be freeholders; but they allege that they hold their land "by fixed customs and services." In other words, they claim to hold by villain tenure. The answer is significant. The defendant demurs on the ground that the plaintiffs possess no cause of action, save for life or limbs or bodily injury, they being his hereditary serfs (*nativi*). In the light thrown by *Le Myrrour* we can understand why the court refused to interfere. The allegation of fixed, or in the language of the pleadings, "certain" services, was intended to raise the presumption, though not the conclusive presumption, that the plaintiffs were villains. It may be taken that the allegation was false. Otherwise, as Bracton lays down (24 b), and as Mr. Vinogradoff himself elsewhere (pages 70, 73, 74) notes, an action would have lain on the covenant, even though the plaintiffs had been serfs. No doubt the "bond-conventioners" of Cornwall occupied the position of serfs under fixed customs, and were not villains, but what their name showed them to be. The existence of such classes leads Mr. Vinogradoff into difficulties when, with his preconception of the identity of villains and serfs, he approaches the question of tenure. The serf, as has been seen, was normally at the mercy of uncertain customs. From that Mr. Vinogradoff somewhat rashly derives the proposition that certain customs mark a free man. "Whatever the customs may be, if they are certain, not only the person holding by them, but the plot he is using are free" (page 78). Let us test this again by one of Mr. Vinogradoff's cases (page 80). It is taken from Bracton's *Note Book* (pl. 1103). The case is an assise of novel disseisin, tried in 1224–25. "The defendant" (I am quoting Mr. Vinogradoff) "excepts against the plaintiff as his villain; the court finds, on the strength of a verdict, that he is a villain, and still they decide that William

may hold the land in dispute, if he consents to perform the service." No wonder that Mr. Vinogradoff, relying not upon Bracton's book of practice, but upon Bracton's book of Romanizing theory, concludes that the procedure and theory were wrong. "Once the exception proved, nothing ought to have been said as to the conditions of the tenure." This is a strong line for a lay writer in the nineteenth century to take upon a judicial process of six centuries ago. I venture to affirm, on the contrary, that the judgment was a perfectly sound one and consistent with what we know of the practice of that day. Its justification is in *Le Myrrour.* That which leads Mr. Vinogradoff to his hasty criticism is the wide divergence between the practice, which recognized existing distinctions, and the theory, which, in slavish imitation of the sharp definitions of Roman law, attempted to mould them into uniformity.

Let us pursue this "exception of villainage" as we find it in the pages of the Romanizing lawyers. And here we perceive how the theorists were constantly showing themselves alive to the exigencies of practice. It was not enough to give possession that the lord should establish his "exception." Without the *Bref de naifté* (Bracton's *breve de nativis*) the lord could not recover the villain. Nor did the word native in this connexion represent a mere confusion of terms. It implied that the demand would have to be supported by specific *nativitas*. We get this again from Britton himself, in the passage I have already quoted in another connexion. In speaking of the "exception of villainage" in his chapter on "Exceptions," he says: "Or he [the lord] may say that the plaintiff is his villain *and* his astrier *and* abiding in his villainage." As the learned editor of Britton, Mr. Nichols, here notes: "That is, as I understand it, in the lord's villainage, or *upon his demesne.*" This interpretation, in itself obviously correct, is fortified by the commentary of Selden upon a similar passage in the eighth chapter of Hengham's *Summa*. The passage in Britton discloses *malgré lui* how different the practice of the courts was from the doctrine of the books. The lord has to prove that the plaintiff against

whom he raises the "exception of villainage" was something more than a villain. Had the Romanist doctrine, which sunk all distinctions, been true to fact, there would have been no meaning in two-thirds of the proof which Britton admits was exacted. The *astrum*, literally, the hearth, "must be taken for the lord's dwelling-house, or such-like," as Selden explains. It is the strongest word that could be employed to convey the idea of that close personal attachment to the lord implied in domanial serfdom. It lends significance to the fact, mentioned by all writers, that the proceeding was formerly directed against a native. If the claimant, says Bracton, be a serf — observe, not a villain — he can be excepted to; and Bracton identifies serfdom with the condition of a native. Britton tells us that when, upon an exception, the plaintiff is "attainted for the villain of the tenant, the tenant may well take him and put him in the stocks, or drive him off the land, as he should his villain." Now we know from *Le Myrrour* upon what class such rigors might be inflicted. Not upon villains, it tells us expressly, but upon serfs.

To recur to the case of 1224–25, the decision of which is impugned by Mr. Vinogradoff. If, in the practice of English law, villain, native and serf were all one and the same class, undoubtedly Mr. Vinogradoff is right, and when the fact of villainage of status was established, as it was upon the trial in question, nothing remained but for the lord to exact the penalties. But the villain customs, as set out by the defendant, who was perhaps a disciple of the Romanizing doctrinaires, were fixed, or "certain." Now we know from *Le Myrrour* that the *differentia* of a villain from a serf was that the serf had no certainty of service. And the judgment was evidently founded upon a recognition of this distinction. The defendant, on the other hand, was anxious to prove serfdom. He elicited the fact that the plaintiff's brother had been sold by him. This, of course, was not conclusive, as the sale might have been in satisfaction of debt (*obnoxiatio*) and the jury expressly found that there was no other evidence of serfdom, such as *merchet, etc.* The plaintiff was adjudged

a villain holding in villainage, and, instead of handing him over to become the defenceless property of the lord, the court confirmed his title to the land in dispute, subject to the condition of rendering the services ascertained to be due.

The two-fold decision of the court in this case — a decision as to the status and a decision as to the tenure — assists us in understanding what really constituted a villain, as distinguished from a native, or serf. The compilation ascribed to Ranulf Flambard, at the close of the eleventh century, called The Laws of William the Conqueror, carefully distinguishes *coloni* from *nativi*. The former, as Bishop Stubbs has remarked, correspond to "the ceorls of the preceding period." It is expressly laid down by the code that it is not "lawful to the lords to remove the cultivators from their land as long as they can do rightful service." On the other hand, natives are regarded as disposed to leave their occupations, in order to avoid the services associated with them. Clearly, then, while the interest of the *colonus*, or "villain," as it appears in the French text, was to remain on his holding, that of the native was conceived to be to escape from his servitude. This is the difference of status which underlies questions of villain tenure. Despite the attempts at identification, the difference continued to receive recognition from the courts.

If we pass from status to tenure, again an underlying distinction presents itself. Of the criterion of certain and uncertain services we have already spoken. To understand the foundation of the distinctions of tenure we must go back to the constitution of the manor itself. It was held to consist of land in demesne, wastes and land in villainage, or customary land. We are all familiar with the doctrine, popularized by the late Mr. Joshua Williams's admirable text-book upon the *Principles of the Law of Real Property*, that no one is an owner of land in England save the sovereign. It is a useful theory, since it frees the appropriation of land for public purposes from the taint of confiscation of private right. Expressed in the language of the feudal period, "the Conqueror got, by right of conquest, all the land of the realm into his

own hands, in demesne." The expression, it needs hardly be said, was suggested by the organization of private manors. The demesne was divided into "bordland," the land which immediately supplied the wants of the manor house, and land held "at will." In Domesday the bordland is called "inland," as opposed to "upland," or land *in servitio, i. e.*, held by services. In that portion of land which was retained in demesne, the tenure of the cultivator was as precarious as in the description of *Le Myrrour.* He was working for the lord's profit, originally to supply him with food. The land he tilled was from that point of view called *terra nativa,* and he himself a man "of native blood." This is the class described by Britton as "pure villains of blood and tenure, who can be ousted from their tenements and their goods at the will of the lord."

In process of time a variety of circumstances combined to improve the condition of these tenants. To absentee landlords it became a convenience to receive their dues in money, a change at first, as Mr. Vinogradoff's pages show, sometimes regarded as a hardship upon the peasantry. A fixed payment would of course be essential; and in this way, almost imperceptibly, land passed out of demesne into customary land. A more formal method was to summon a manorial jury, marking the conversion of demesne into customary land by a solemn assize, whence the designation "*terra assisa.*" In the history of the manor of Castle Combe we find a wholesale conversion of demesne into customary land, the apportionments corresponding to the area of the existing holdings in villainage. But here and there, as Fitzherbert observes, the old system survived, and bondmen held with no more certainty of tenure than in the days of Bracton and of *Le Myrrour.*

Although, as we hear from Littleton, even free men were occasionally found ready to undertake land upon the tenure and services of serfs, such a symptom of land hunger was doubtless regarded by most people, as it was by him, as "an act of insanity." But there is no question that when, in the fourteenth century, labor became scarce, lords were glad enough to grant out their demesne in villainage to freemen, or,

as frequently happened, to lease it for terms of years. With the land the lessee took the natives, or bondmen, upon it. It was to his interest to retain them in this condition, he acting as himself the supervisor of their gratuitous labor. It was upon such estates, it may be suspected, that the class lingered longest when it had disappeared in most parts of the country.

It must not be left out of sight that, as laid down by all the jurists, tenure did not directly affect status, though this principle was so far departed from that certain legal inferences "in favor of freedom" were drawn by the courts from tenure to status. When men "of native blood" became customary holders the taint of their status still clave to them. It was to the lord's interest that this should be the case. According to the lawyers, villains by blood, or natives, were subject to tallage without limits (*de alto et basso*) at the will of the lord. But the limitations upon the exercise of this right, though originally imposed by no external authority, were early prescribed by economic convenience, and to tallage villains "to destruction" was legally condemned as "waste." Customary compositions, therefore, generally established themselves, and the persons upon whom they were obligatory, whether with respect to status or to convention, were duly inscribed upon the manorial rolls.

The difficulties attendant upon Mr. Vinogradoff's disposition to slur over the distinctions between the various dependent classes recur in connexion with ancient demesne. The doctrine of ancient demesne is one of the most interesting and important in the history of villainage. Ancient demesne was land which had been *terra regis* in the reign of the Confessor. This clearly points to a time when the kings of England were not conceived, as the Elizabethan lawyers asserted of the Conqueror, to have "all the lands of England in demeane." With respect to this land the persistent confidence of the English people in the equity of the royal saint asserted itself. "The laws of Edward the Confessor" were to be maintained on his lands, into whose hands soever they passed. The "men

of ancient demesne" were personally free and their services were fixed. But besides these privileges of tenure which, as the cases in the law books show, were largely shared by customary tenants, they enjoyed certain political and commercial advantages.

> Tenants are not bound to attend the county court or the hundred moot; they are not assessed with the rest for danegeld or common amercements, or the murder-fine; they are exempt from the jurisdiction of the sheriff, and do not serve on juries and assizes before the king's justices; they are free from toll in all markets and custom houses.

These exemptions were of considerable value and created a favored class distinguished by the title of villain sokemen. It was, however, rather out of tender care for the interests of the crown than for the welfare of its tenants that these concessions were upheld by law when the land had passed into private hands. As Mr. Vinogradoff shows (page 107, note 4) by an apt quotation from Britton, the demesnes of the crown were in theory inalienable. He quotes also, in illustration of this, from the Stoneleigh Abbey register an order by Edward I for an inquisition into the state of that property. The king explicitly contemplates the possibility of a resumption at some indefinite time, and the order alleges the need for protecting the crown against the changes which should impair the value of its reversionary interest.

To what class upon other estates did these privileged tenants correspond? Mr. Vinogradoff has no difficulty (page 112) in rebutting Mr. Elton's assertion that "it is only the freeholders who are tenants in ancient demesne." He states with perfect accuracy, citing Bracton, that on ancient demesne there are, besides villain sokemen and free tenants, pure villains too. He quotes the Stoneleigh register, which speaks of natives, or serfs, on ancient demesne, as distinguished from the regular customary tenants. These natives, or serfs, are in other registers called villains — a fact, I may add, which testifies to the confusion of names which came in with the thirteenth century, since the Laws of William the Conqueror translate "sokeman"

by "villein." But how is it that on ancient demesne manors a class which elsewhere Mr. Vinogradoff represents to have been regarded as homogeneous becomes differentiated? If on these manors the customary tenants or villain sokemen on the one hand and the natives on the other are completely distinct, how did the distinction arise? Surely the normal class distinctions prevailing on the lands of the Confessor must have had some parallel outside. And if so, there is at least a *prima facie* probability that the tenacity of custom would have ensured their survival.

It is in connexion with these admitted distinctions that Mr. Vinogradoff stumbles upon the key to the problems of villainage. Yet he does not seem to recognize the extent of its application. "It is," he says, "of considerable importance to note that the difference between villains pure and villains privileged was sometimes connected with the distinction between the lord's demesne and the tenant's land in the manor," in other words, the customary lands. Herein lies the anomaly of the tenure in ancient demesne, as well as the secret of the tenure in villainage generally. The peculiarity of villainage in ancient demesne was that the land was conceived to be, not customary land proper, but demesne held upon a customary tenure. That is the significance of the doctrine already noticed, that the king could not irrevocably part with it. It was in theory, as it were, "bordland," for the sustenance of the sovereign. But customary tenure, here as elsewhere, had at an early date been found more convenient than the exaction of labor from serfs. It is quite intelligible that, at a time when the king's existence was a perpetual progress, this should have made itself felt earlier upon royal than upon private estates. But with the Conquest the movement toward the substitution of the customary tenure was arrested and the customary holders, or sokemen, and the serfs remained two distinct bodies. Now if Mr. Vinogradoff had appreciated the importance of his point as to the distinctive character of holdings upon the lord's demesne, he would have used it to explain the position of natives, or serfs, in ancient demesne and else-

where. But his tendency, as has been seen, is upon other manors to follow the lawyers' attempt to identify the serfs with villains. Upon ancient demesne it is quite impossible for him to confound them with sokemen, whose difference of name protects them from such a mistake. But he has nothing to say of their presence there, and when a case meets him which turns upon their status, he dismisses it with the contemptuous epithet "astonishing," exactly as he condemns the decision of 1225.

The example referred to is given in full by Mr. Vinogradoff in Appendix VII (page 431), but may be best summarized in his own words:

> In 1294 some Norfolk men tried to get justice against Roger Bigod (Bygod in the original manuscript), the celebrated defender of English liberties. They say that they have been pleading against him for twenty years, and give very definite references. The jury summoned declares in their favor. The earl opposes them by the astonishing answer that they are not his tenants at all. It all ends by the collapse of the plaintiffs for no apparent reason; they do not come into court ultimately, and the jurors plead guilty of having given a false verdict. [Page 101, note 5.]

So much for the facts as stated by Mr. Vinogradoff. Now for the original, as printed in his appendix. According to the plaintiffs — and the allegation does not appear to have been traversed — the manor in question, of which they claimed to be tenants, was ancient demesne. As tenants of ancient demesne, they claimed to hold by fixed services. They complained that Roger Bygod and his predecessor in title (who was his uncle) had exacted from them services villain and uncertain. Now mark the answer of Roger Bygod. The plaintiffs, he avers,

> set out in the writ that they are the men (*homines*) of the same Roger of the manor aforesaid and tenants of the same manor, the which William and others [the plaintiffs] are not the men of the same Roger of the manor aforesaid . . . and further, they do not hold any tenements in the manor aforesaid, nor did they hold on the day aforesaid [the date of the writ], nor for a long time before that date, wherefore he demands judgment. . . .

The plaintiffs were six in number. Two of them in reply traverse the earl's denial and set out their holdings. One claims that at the dates of the issue of the writ and the statement of claim he held one messuage, one croft and half an acre of marsh land ; a second, that he held one messuage and eight acres of marsh land. Both of these repeat that they are the *homines* of the earl. The other four plaintiffs traverse the earl's denials otherwise. They say that they sued out a writ against him twenty years before, being at that time the *homines* of the said earl and tenants of the manor aforesaid, and that they have prosecuted the action uninterruptedly ever since, reviving the writ whenever it abated. This plea probably refers to the employment of Bygod in military service, whether in Edward I's expedition to Palestine, or in Wales, where he is known to have been engaged in 1282. The service of the king, we learn from Bracton, was a cause of abatement of proceedings. The plaintiffs add that the earl's eviction of them during the pendency of the litigation ought not to found a plea against their claims as tenants. To this the earl took the technical objection that they had not revived the writ, and this was the first issue to be tried. That he had evicted them, may therefore be taken as true. Upon the day appointed to try the issue as to the writ these four plaintiffs failed to appear, and they and their pledges were "at mercy." From this it may be inferred that in their case the objection was good. In the case of the other two tenants a jury was empaneled, which returned a verdict that on the day and year aforesaid they were not the men of the earl nor tenants of the manor.

What did these two plaintiffs mean by alleging that they were *homines* of the earl and tenants of the manor? They meant that they were villain sokemen, entitled therefore, as they said, to fixed services and fixity of tenure. The evidence of their villainage was twofold. First, their holdings. As to these, it must be admitted that they were so small as to raise a presumption that the earl was right. Certainly they were not tenants of the normal holding of the *villani* of Domesday,

the virgate of thirty acres. Most suspicious of all, they do not appear to have held land in the open fields, but marsh land, that is, in all probability, land of the wastes of the manor, which since the statute of Merton in 1236 was commonly accounted part of the lord's demesne. The area of the holdings is not, however, absolutely conclusive of the case. Hence the necessity felt on both sides for the other plea, that the plaintiffs were or were not the *homines* of the lord. The claim implied a special personal relation. We know what that relation was. Villains took an oath of fealty to the lord. "Fidelitatem fecerunt atque hominium," as the mediaeval phrase ran, though this last word perhaps refers more especially to homage, the mark of free tenants. The oath of the villain is given in the original Norman French in the Statutes of the Realm among acts of uncertain date, though, as Madox has observed, it is rather in the nature of a precedent. Now had the plaintiffs been able to establish their assertion that they were the men of the earl by fealty, a reciprocal obligation would at once have attached to the earl. Although, as ancient jurists have explained, the lord did not take an oath of fidelity to his vassal, he was, nevertheless, in effect equally bound. "That it was binding on both sides appears from the most authentick explanations of this engagement," says Wright in his learned work on *Tenures*. It is now possible to understand the plea which Mr. Vinogradoff considers "astonishing," that the plaintiffs are not the men of the defendant earl. The still more "astonishing" verdict of the jury, that "they were not the men of the aforesaid earl nor tenants of the aforesaid manor," seems a perfectly legitimate conclusion.

If that be so, who were the plaintiffs in the eye of the law? For they appear to have been *de facto* dwellers upon the estate. According to Mr. Vinogradoff's theory, they were victims of legal oppression, and the jury acted in collusion with the earl. It must, however, be remembered, that they were, in Mr. Vinogradoff's view, villain sokemen or tenants of ancient demesne. Now we know — indeed Mr. Vinogradoff has treated the point with much detail and precision (pages

113–116) — that tenants of ancient demesne were carefully protected by the king's courts. We also know that the king in 1225 was none other than Edward I, himself only a few years later the invader of baronial rights as represented by this same Earl Roger in a historic passage of arms. This was not a sovereign likely to tolerate aggressions upon a prerogative so valued as that which, on the plea of ancient demesne, enabled the crown to intervene in the administration of the estates of great feudatories. On general grounds, therefore, Mr. Vinogradoff's position is encompassed by improbabilities.

The explanation of the case and the justification, from a feudal point of view, of the verdict and judgment are to be found in a passage of Britton already quoted, describing the complete disabilities of "pure villains" in ancient demesne. They had no customary rights, but were literally tenants at will, or in the phrase of later lawyers, "tenants at will at common law." We know from Littleton that such were distinguished from customary tenants, also technically "at will," in that they did no fealty. It must be borne in mind that in Domesday, and even in the Hundred Rolls, tenants are classed by status as *liberi, villani, cotarii, etc.* The term "tenant at will," as a classification, belongs to a later period when, as Sir Henry Maine would put it, status was replaced by contract. Spelman tells us that "tenant" conveys to the English what "vassall" does to foreigners. "Vassall," we know from Du Cange, is a term properly used of the magnates admitted to the intimacy of sovereign rulers. And thus, though the plaintiffs against Earl Roger may be said to have held land at will, as Fleta describes servile tenure, the earl was probably justified in denying that they were "tenants" at all, or "men" by virtue of fealty.

I do not, as has been seen, regard Mr. Vinogradoff as uniformly successful in his treatment of the statements of English lawyers or of the points raised by English law, so far as the classes comprised under the name "villain" are concerned. But I have nothing but commendation for that part of his work which analyzes the manor and the village

community. In this he reproduces the results of his *Inquiries into the Social History of Mediæval England*, a work which has for five years past been in the hands of Russian scholars. Upon the origin of the system of intermixed strips he is at issue with Mr. Seebohm. While by Mr. Seebohm its explanation is sought in co-aration and in the allotment to coöperative households of shares correspondent to their contribution of oxen for ploughing, Mr. Vinogradoff adduces evidence to show that the system had "its roots in the wish to equalize the holdings as to the quantity and quality of the land assigned to them, in spite of all differences in the shape, the position and the value of the soil." In Russia and elsewhere, where at the present day such communities exist, nothing resembling co-aration is to be found. In England too, as Mr. Vinogradoff shows from mediæval documents, the "peasantry appear to have been commonly provided with small ploughs drawn by four beasts." And even if this were not so, Mr. Seebohm's theory has to meet the difficulty that "if the strips followed each other as parts of the plough team, the great owners would have been possessed of compact plots" (page 254).

An equally vexed question is the position and origin of the free tenants in a manor. According to Mr. Seebohm, the two divisions of manorial land were exhaustive — land in villainage and the land of the lord, or demesne. But Mr. Vinogradoff insists upon the number of free tenants everywhere to be found, quite apart from any suspicion that they represent grants by the lord. They were not bound by the uniformity of the villain holdings, but despite the irregularities in the areas of their possessions, they point to "a system similar to that which prevailed on villain soil" (page 328). "The traits which mark these are 'shareholding' and light rents. The light rents do not look like the results of commutation; the 'shareholding' points to some other cause than favors bestowed by the lord."

Writers who are the victims of legal theories, failing to reflect that if the theories sometimes express, they also sometimes conceal facts, are satisfied to conclude against the original

rights of freemen, because, in legal text-books, every holding presupposes a grant. Mr. Vinogradoff lays just stress upon the incidents attending many of these so-called grants. The surveys constantly record the rendering of trifling duties, the payment of a rose, of a peppercorn, or of sums of money as insignificant as a penny. These

> can have only one meaning — that of recognition. Trifling in themselves, they establish the subordinate relation of one owner to the other, and although their imposition must be considered from the formal standpoint of feudal law as the result of a feoffment, it is clear that their real foundation must often have been a submission to patronage.

Indeed, the very maxims of feudal law make for the same conclusion. "Every manor," said the lawyers, "has a court-baron incident to it"; that is, a court of freeholders — a conception impossible if the manor consisted originally of but two classes, the lord and his dependants.

The study of manorial courts has received a stimulus from Professor Maitland's well-known introduction to the second volume of the Selden Society's publications. Mr. Vinogradoff brings out a point in this connexion of which comparatively little notice has hitherto been taken, and which was even neglected by Mr. Seebohm. This is the relation between the village conceived of as a corporation, or, as Mr. Vinogradoff prefers to phrase it, "as a juristic person," and the court of the lord.

> The court rolls of Brightwaltham, edited for the Selden Society by Mr. Maitland, give a palmary example of this. The village of Brightwaltham enters into a formal agreement with the lord of the manor as to some commons. It surrenders its rights to the lord with regard to the wood of Hemele, and gets rid in return of the rights claimed by the lord in Estfield and in a wood called Trendale. Nothing can be more explicit: the village acts as an organized community; it evidently has free disposition as to rights connected with the soil; it disposes of these rights not only independently of the lord, but in an exchange to which he appears as a party. We see no traces of the rightless condition of villains, which is supposed to be their legal lot.

The village appears again in its corporate capacity when it hires land to farm, a proceeding of which we have records as late as the sixteenth century. Last of all,

> we have indications of separate village meetings under the manorial court. . . . In several instances the entries printed in the second volume of the Selden Society's publications point to the action of the townships as distinct from the manorial court and placed under it. In Broughton a man distrained for default puts himself on the verdict of the whole court *and of the township* of Hurst, both villains and freemen, that he owes no suit to the court of Broughton, save twice a year and to afforce the court.

I cannot help reflecting that if Mr. Vinogradoff had begun his work with this analysis of the manorial system and of its relation to the township, he would have reposed less confidence in the statements of the Romanizing school of lawyers. In the chapter in which he summarizes his conclusions he comments upon the difficulties which these points of manorial organization throw in the way of "the partisans of the servile community." The manorial court's

> body of suitors may have consisted to a great extent of serfs, but surely it must have contained a powerful free admixture also, because out of serfdom could hardly have arisen all the privileges and rights which make it a constitutional establishment by the side of the lord.

In a word, the manorial order has been superimposed upon the more ancient communal organization of the peasantry.

Enough has been said to show that there is warrant for a reconsideration of this question as left by Mr. Seebohm. The next trend of scholarly research will be towards the manorial system as it existed before the Conquest. America is to be congratulated on having produced in Mr. Andrews a skilful pioneer in this work. If any reliance may be placed upon tradition, we may expect to find in the records of these centuries, when submitted to the exacter scrutiny of inquirers of the new school, materials out of which we may remodel our conceptions as to the primitive social organizations of the English-speaking race.

I. S. LEADAM.